Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4791

GRACE K. McFARLAND,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

GRACE K. McFARLAND,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner respectfully petitions that a Writ of Certiorari issue to the United States Court of Claims to review the judgment of that Court entered May 14, 1975, and its Order denying a rehearing *en banc* of said decision entered June 27, 1975.

OPINION BELOW

The Opinion on the case in the Court of Claims was a Memorandum Opinion which will be reported in 207 Ct. Cl. ___, 517 F.2d 938 (1975) and is printed in Appendix A, *infra*. The Order denying a rehearing of said Opinion is printed in Appendix B, *infra*.

JURISDICTION

The Order of the Court of Claims was entered on June 27, 1975. The jurisdiction of this Court is invoked under 28, U.S.C. 1255(1) and the Rules of the Supreme Court of the United States Rule 19(1)(b) and 2.

QUESTION PRESENTED

Were Petitioner's rights of due process violated when she was denied a hearing "at some stage of the proceedings" before her involuntary disability separation became final?

STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment.

5 U.S.C. 8337 (1970).

5 U.S.C. 7501, 80 Stat. 572 (The Lloyd-Lafollette Act)
Federal Personnel Manual, Supp. 831, Sub-Chapter 510-10.

(See also, 33 Fed. Reg. 7715-7717).

STATEMENT OF THE CASE

This case involves the involuntary disability separation of a classified Civil Service employee in 1968, from her position of Accounting Technician, GS-5 with the Department of the Air Force at Patrick Air Force Base in Florida. The opinion of the Court of Claims which appears as Appendix A herein adopted the Trial Judge's opinion which adequately sets forth a chronological history of the events leading up to this petition.

A review of the Trial Judge's opinion will reveal that the Petitioner had been employed at Patrick Air Force Base, in the field of accounting since 1951. She began her federal service in 1942 with the Department of the Army.

The events which led up to her involuntary retirement allegedly began in November of 1964 and concluded on February of 1967. During this period of time the Petitioner's supervisor was a Mr. Clark, except for a short period between June, 1966 to September 1966, when she was under the direct supervision of a Mr. Lopez-Vega. The incidents which these two supervisors considered to be disruptive job behavior consisted of the following:

1. In November 1964, plaintiff requested authorization of Mr. Clark to work overtime. She was denied this and began to cry and according to Mr. Clark, created a scene.

2. Between June 12, 1966, and September 12, 1966, Mr. Lopez-Vega recorded five incidents concerning the Petitioner which in general amounted to:

a. her refusal to carry out his instructions on three occasions

b. her use of hostile and insulting language to a fellow worker

c. refusal to comply with his written instructions.

3. On February 2, 1967, the Petitioner and her Technical Supervisor, Miss Grice had an exchange regarding the Petitioner's mailing out an original, rather than a duplicate of a report.

The above incidents are more fully detailed in the Trial Judge's opinion. However, they constitute the totality of events leading up to Mr. Clark's reporting them to the Chief, Accounting and Finance Branch. As a result of this report, the Chief Accounting and Finance Branch directed the Petitioner "by reason of your disruptive job behavior which has continued over the past three years" to report to the Patrick Air Force Base Hospital for a medical examination to determine whether she was physically able to continue in her assigned tasks.

Thereafter, the Petitioner was seen by two psychiatrists, the first at the request of the Chief, Accounting and Finance Branch, and the second at the request of the Regional Medical Officer of the Civil Service Commission.

Each psychiatrist based his report on a single interview of approximately one-half hour's duration. The first psychiatrist, Dr. Adickes, concluded that the Petitioner "has a persecution complex with paranoid delusions prominent enough to create difficulty in maintaining reasonable behavior." The second psychiatrist, Dr. James R. Parsons,

after reviewing the report of Dr. Adickes, rendered a diagnosis of "Schizophrenic reaction, paranoid type, with depressive trend." Dr. Parsons later testified in proceedings below that his first opinion and diagnosis was "definitely inaccurate" and that making a diagnosis of mental illness on the basis of a single interview was unfair both to the patient and the psychiatrist.

The Civil Service Commission acting upon the involuntary disability application filed by the Petitioner's superiors, and the (now revealed "definitely inaccurate") psychiatrist's report then notified the Petitioner in July 29, 1967 of her involuntary disability retirement.

Up to the time of this notification, the Petitioner was not appraised of the specific charges contained in the reports of her superiors, was not given a copy of the psychiatric reports, and above all was not afforded an opportunity for any hearing or proceeding to defend the action taken against her.

At all times during this procedure, the Petitioner asserted her rights to a hearing and specifically requested such from the Civil Service Commission. She also requested that she be confronted with the evidence submitted against her contained in the reports of her superiors and in the psychiatric evaluations. The Trial Judge's opinion will reflect that the Petitioner made repeated requests upon the Civil Service Commission for a hearing both prior to the time the retirement became final and again at the appellate level of the Civil Service procedures.

The Civil Service Commission treated her requests as an appeal, but did not grant her a hearing. The Petitioner submitted to the Civil Service Commission evidence from independent psychiatrists which she had consulted indicating

that she did not have a mental illness, and in addition, she submitted a letter from the aforesaid Dr. Parsons who had changed his original diagnosis of her and stated that "I see no reason why Mrs. McFarland's appeal should not be considered favorably."

The Board of Appeals and Review of the Civil Service Commission without a hearing, but with the new evidence before it, affirmed the decision of the Bureau of Retirement and Insurance to involuntarily retire Mrs. McFarland.

At no time throughout the proceedings was Petitioner, Mrs. McFarland, granted any hearing either at the Agency or Civil Service level. On September 30, 1971, the Petitioner, through her present attorneys, filed a petition with the United States Court of Claims from which decision the Petitioner is hereby filing this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This Court has ruled in the case of *Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 15, 94 S. Ct. 1633 (1974) that a government job is a property interest which cannot be taken away from an employee without a hearing "*at some stage of the proceedings*" (emphasis added) because of the due process guarantees of the United States Constitution. The Petitioner's rights to a due process hearing were violated when the Civil Service Commission terminated her employment on an involuntary disability retirement without affording her a due process hearing, such as mandated in the case of *Arnett v. Kennedy, supra.*

This petitioner, a federal employee in the competitive service was guaranteed continued employment absent "cause"

for discharge or suspension.[1] With such guarantee, the property right of Petitioner in her government position required that she be accorded the minimal procedural guarantees of due process extended by the Fifth Amendment of the Constitution. And so six of the Justices in the case of *Arnett v. Kennedy, supra,* agreed.

These minimal guarantees are those of notice and a hearing. The question of notice is not present here, but Petitioner's rights were violated when she was denied a hearing at any stage of the proceedings.[2]

It has been Petitioner's continual claim throughout the proceedings that she was at some juncture entitled to a hearing under the basic Constitutional guarantees of due process.[3]

Prior to this Court's opinions in *Arnett v. Kennedy, supra,* the right of a citizen not to have his property taken without a hearing was well established. *Connell v. Higginbotham,* 403 U.S. 207 (1971) (loss of a state job); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (loss of welfare payments); *Morrissey v. Brewer,* 408 U.S. 471 (1972) (revocation of a parole); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (cancellation of a prisoner's good-time credits); *Bell v. Burson,* 402 U.S. 535 (1971) (cancellation of a driver's license); *Board of Regents v. Roth,* 408 U.S. 564 (1972) (damaged reputation

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[1] 5 U.S.C. 7501, 80 Stat. 527.

[2] No contention is made for entitlement to some hearing *prior* to removal at the agency level as opposed to a hearing *after* removal by the Civil Service Commission.

[3] After June 30, 1968, Civil Service Regulations provided for a hearing in instances of involuntary retirement discharges (33 Fed. Reg. 7715-7717). Petitioner's discharge was effective June 11, 1968.

and standing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment of wages); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure of mortgaged property).

Six Justices in *Arnett v. Kennedy, supra*, reaffirmed the constitutional guarantee in a federal employee to a hearing.

The plurality opinion by Justice Rehnquist allowed that a hearing "after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause," 416 U.S. at 157.

Relying upon the decisions of *Board of Regents v. Roth, supra*, and *Perry v. Sindermann*, 408 U.S. 593 (1972), Justice Powell in his opinion in *Arnett v. Kennedy, supra*, concluded that termination of the employment of a federal employee requires both notice and a hearing by reason of the employee's property interest under the Fifth Amendment, 416 U.S. at 166.

Justice White in his opinion in *Arnett v. Kennedy, supra*, discussed at some length the decisional support for due process entitlement for Civil Service employees facing separation from the roles, and in 416 U.S. 178-179, states:

> "The past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests. The principles of due process "come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." *Dent v. West Virginia*, 129 U.S. 114, 123, 32 L.Ed. 623, 9 S. Ct. 231 (1889). The "right to be

heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring).

This basic principle has unwaveringly been applied when private property has been taken by the State. A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S. Ct. 779 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 389 U.S. 545, 552, 14 L. Ed.2d 62, 85 S. Ct. 1187 (1965). Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 53 L. Ed. 195, 29 S. Ct. 101 (1908) (seizure of food unfit for consumption); *Central Trust Co. v. Garvan*, 254 U.S. 554, 65 L. Ed. 403, 41 S. Ct. 214 (1921) (seizure of property under Trading with the Enemy Act); *Corn Exchange Bank v. Coler*, 280 U.S. 218, 74 L. Ed. 378, 50 S. Ct. 94 (1930) (seizure of assets of an absconding husband); *Phillips v. Commissioner*, 283 U.S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931) (collection of a tax); *Bowles v. Willingham*, 321 U.S. 503, 88 L. Ed. 892, 64 S. Ct. 641 (1944) (setting of price regulations); *Fahey v. Mallonee*, 332 U.S.

245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947) (appointment of conservator of assets of savings and loan association); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 94 L. Ed. 1088, 70 S. Ct. 870 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time."

Justice White then concluded, 416 U.S. at 185-186:

"I conclude, therefore, that as a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the Lloyd-La Follette Act converge, because a full trial-type hearing is provided by statute before termination from the service becomes final, by way of appeal either through OEO, the Civil Service Commission or both."

Justice Marshall with whom Justice Douglas and Justice Brennan concurred, observed in his dissenting opinion (416 U.S. 212) that:

"... due process requires that a hearing be held "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 85 S. Ct. 1187 (1965), but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee. *Goldberg v. Kelly*, 397 U.S. at 263, 25 L.Ed.2d

287; see *Cafeteria Workers v. McElroy*, 367 U.S. 886, 395, 6 L.Ed2d 1230, 81 S. Ct. 1743 (1961).

The interests of a public employee in a secure Government job are as weighty as other interests which we have found to require at least the rudimentary protection of an evidentiary hearing as a precondition to termination."

Justice Marshall further commented at 416 U.S. 226-227 that:

"The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore the right to an evidentiary hearing before an impartial decision-maker prior to dismissal."

The decision of *Arnett v. Kennedy, supra,* was not overlooked by the three-judge panel which reviewed Petitioner's case in the United States Court of Claims below. Judge Skelton concurred in the opinion for the sole reason that under the rules of the United States Court of Claims a three-judge panel could not overrule an *en banc* decision of that Court. Judge Skelton noted the decision of *Scroggins v. United States,* 184 Ct. Cl. 530, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968) in which the Court of Claims held that in an involuntary retirement case where physical disability is the basis for the retirement, the employee is not entitled to a hearing at any stage of the proceedings. After acknowledging the fact that the panel could not overrule such an *en banc* decision, Judge Skelton stated as follows (page 13, Appendix A, *infra*):

"Were it not for our rule aforesaid, I would dissent on the ground that the plaintiff was entitled to a hearing before her involuntary retirement became final because of the later decision of the Supreme Court in *Arnett v. Kennedy, supra,* 416 U.S. 134 (1974), and other similar cases. In that case the Supreme Court held that a government job was property that could not be taken away from an employee without a hearing at some stage of the proceedings because of the due process clause of the Constitution. While it is true that case involved the discharge of an employee for cause and not retirement for disability, I think the same basic rules should apply and that a hearing is required by the due process clause in both instances."

The Petitioner gave the Court of Claims the opportunity to correct this procedural problem by requesting a rehearing *en banc,* however, the Court denied this motion on June 27, 1975.

The Court of Claims in its majority opinion below agreed that *Arnett v. Kennedy, supra,* provided for a hearing at "some time" but went on to erroneously conclude that a trial before a Trial Judge of the Court of Claims satisfied this requirement (Appendix p. 12).

In support of their position that the Court trial before the Court of Claims Trial Judge satisfies the requirements of *Arnett v. Kennedy, supra,* the majority of the Court panel below cited the case of *Phillips v. Commissioner,* 283 U.S. 589, 75 L. Ed. 1289 (1931) and the case of *Central Trust Co. v. Garvan,* 254 U.S. 554, 65 L. Ed. 403 (1921).

In the case of *Phillips v. Commissioner,* the Internal Revenue Service sought the payment of back taxes of a dissolved corporation from one of the stockholders. In that case the Commissioner of the Internal Revenue had made the defiency assessment, and thereafter the taxpayer was given a right for a determination of his liability. The taxpayer argued that the procedure violated due process because it did not provide for a judicial termination of his liability at the outset. Justice Brandis speaking for the Court noted that the taxpayer had two alternatives for contesting his liability. He could pay the tax and bring a suit in the Courts for a refund or he could avail himself of administrative remedies by seeking an immediate redetermination of the liability by the Board of Tax Appeals. With respect to the second alternative, Justice Brandis noted in 283 U.S. at 598 as follows:

"Thus within sixty days after the Commissioner determines that the transferee is liable for an unpaid defiency and gives notice thereof, the latter may file a petition with the Board of Tax Appeals. Formal notice of the tax liability is thus given; the Commissioner is required to answer; and there is a complete hearing *de novo* according to the rules of evidence applicable in Courts of Equity of the District of Columbia. This remedy may be had before payment, without giving bond (unless the Commissioner in his discretion deems a jeopardy assessment necessary). The transferee has a right to a preliminary examination of the books, papers, and other evidence of the taxpayers; and the burden of proof is on the Commissioner to show that the appellant is liable as the transferee of the property, though not to show that the taxpayer was liable

> for the tax. A review by the Circuit Court of Appeals of an adverse determination may be had; and assessment and collection meanwhile may be stayed by giving bond to secure payment."

Thus it is believed that the Court of Claims misconstrued the case of *Phillips v. Commissioner, supra,* since the taxpayer there was in fact entitled to a hearing at the administrative level if he so elected.

The other case relied on by the Court of Claims, *Central Trust Co. v. Garvan, supra,* involved the Trading with the Enemy Act of 1917, which provided that the Alien Property Custodian could make an administrative determination that property belonged to the enemy and should be delivered, conveyed, or transferred to him. The act also provided that the party whose property had been taken could file a claim at the administrative level for its return, and if denied, he had the right to bring suit in the District Court.

At no time in the *Central Trust* case did the claimants assert a right to a hearing at the administrative level, and the Constitutional question of their rights to a due process hearing at any administrative level was never considered by the Supreme Court. Thus the Court of Claims reliance upon the *Central Trust* case is also misplaced in that it never resolved the question of whether a subsequent court trial can be the substitute for an administrative hearing.

It is further submitted that the hearing before a trial Judge of the Court of Claims cannot be substituted for an administrative hearing because the issues to be tried are not the issues which were to be, or could be, decided in a hearing at the Civil Service Commission or Agency level. If the Petitioner had been afforded a hearing at the Civil Service

level, the issue would have been whether she was physically or mentally incapable of performing her duties on the job and whether there was cause for her separation. On the other hand, the issues to be determined by the Court of Claims Trial Judge were developed as follows:

1. Did the action by Agency officials in preparing an application for total disability and the examination of Dr. Parsons constitute error which went to the very heart of the administrative determination of disability?
2. Was the action by the Civil Service Commission, after being placed on notice of the erroneous determination made by Dr. Parsons arbitrary and capricious and, therefore, erroneous?
3. Was plaintiff guilty of laches?

Thus, it is clear that the issues to be determined by the Trial Judge were in no way similar to the issue for determination at the Civil Service Commission or Agency level. This is of extreme importance since a hearing at the Civil Service Commission level would have examined the actions of the Petitioner whereas the hearing at the Court of Claims level dealt with the actions of Agency and Civil Service officials in an effort to determine whether or not they acted in good faith. As the Court of Claims Trial Judge himself noted (page 8, Appendix A, *infra*):

> "The presumption that government officials have acted in good faith in making a decision can be overcome only by a strong showing to the contrary . . . . While there is room for doubt that Agency action in preparing the application is of any relevance here, it is in any event clear that

the presumption of good faith has not been overcome."

The Trial Judge further went on to comment (page 9, Appendix A, *infra*) as follows:

> "The duty of determining questions of disability is imposed by statute on the Commission, and only some error 'going to the heart of the administrative determination', as defined in *Scroggins v. United States, supra,* permits the setting aside by a Court of the administrative discharge of that duty."

Thus, the Trial Judge recognized that the issues before him were *entirely different* than those which would have been aired at a hearing at the Agency or Civil Service Commission level.

To say that the trial before the Court of Claims in this case satisfies the requirements of *Arnett v. Kennedy, supra,* is to misinterpret the full import of that decision. It is submitted that the hearing called for in *Arnett v. Kennedy, supra,* should determine in the first instance whether or not an employee can be removed from his or her job and such a hearing should not be insulated by presumptions that those who did the removing acted in good faith.

Certainly the hearing guarantee discussed by the Justices in *Arnett v. Kennedy, supra,* was a hearing before the termination process [either before or after cessation of pay] was complete. This would embrace proceedings conducted by either the Agency or Civil Service Commission. A trial before the Court of Claims is not, and cannot be, a substitute for such a hearing. Considerations of delay,

availability, funding, geographical location, etc., clearly militate against any such concept of equivalency. The administrative hearing is the due process arena. The constitutional guarantee of administrative hearing *before* the appellate processing of the separation has been finalized is the hearing of which this Court speaks when it addresses itself to the property rights of Civil servants in their jobs.

Of course, secondary to the Constitutional question of whether or not the Petitioner was entitled to a hearing, is the question of whether or not the actions of the Civil Service Commission, after being placed on notice of the erroneous psychiatric diagnosis made by Dr. Parsons. constituted reversible error.

The Trial Judge's opinion shows that not only did the Petitioner supply the Civil Service Commission with opinions from independent psychiatrists indicating that she was not mentally disabled, but in addition thereto, one of the government's own examining psychiatrists, Dr. Parsons, later changed his opinion and concluded that his original diagnosis was "definitely inaccurate". Thus the basic determination of disability made by the Civil Service Commission was predicated upon an erroneous evaluation made by Dr. Parsons. When apprised of such information, the Civil Service Commission's refusal to overturn its original determination or to grant a hearing to the Petitioner was nothing less than arbitrary.

There is every possibility that if the Petitioner in this case had been afforded a hearing at the Civil Service level, she would not have been involuntarily retired from her job. She was removed based upon the statements of two psychiatrists, who examined her for a period of approximately one-half hour each and one of whom later reversed his

diagnosis. The Petitioner's case is a classic example of the harsh abuse which can result from the omission of proper due process guarantees. As Justice White said in the case of *Arnett v. Kennedy, supra,* it is clear "that as a matter of due process, a hearing must be held at some time before a competitive Civil Service employee may be finally terminated for misconduct" (see: 416 U.S. 185). This basic right under our Constitution was denied to this Petitioner.

CONCLUSION

This Court should accept this Petition for a Writ of Certiorari in order to right the wrongs which have been inflicted upon the Petitioner and to further clarify any confusion which may exist among the Bar and the Courts as to the true meaning of the decision in *Arnett v. Kennedy, supra.*

Respectfully submitted,

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September, 1975.

APPENDIX A

In the United States Court of Claims

No. 746-71

(Decided May 14, 1975)

GRACE K. McFARLAND v. THE UNITED STATES

John J. Heise, Jr., attorney of record, for plaintiff. *Heise and Jorgensen*, of counsel.

Raymond B. Benzinger, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before SKELTON, KASHIWA, and KUNZIG, *Judges.*

OPINION

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision filed April 25, 1974, by Trial Judge Harry E. Wood pursuant to Rule 134(h). The court has considered the case on the briefs and oral argument of counsel. Since the court agrees with the trial judge's recommended decision, with modifications by the court, as hereinafter set forth,* it hereby affirms and adopts the same, as modified, as the basis for its judgment in this case.† Therefore, plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

WOOD, *Trial Judge:* In this action, plaintiff sues to recover "back salary", less appropriate offsets, from and after

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed April 25, 1974, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

†The concurring opinion of SKELTON, *Judge*, follows the opinion of the trial judge which has been adopted by the court.

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June 12, 1968, on the ground that her involuntary retirement for physical disability from her position as an accounting technician, GS–5, at Patrick Air Force Base, Florida, effective June 11, 1968, was unlawful.

Plaintiff contends (1) that the agency application for plaintiff's disability retirement, and a psychiatric evaluation subsequent to the said application, but prior to action by the Civil Service Commission on the agency application, "constitute error which went to the very heart of the administrative determination of disability", and (2) that both the Civil Service Commission's "refusal to overturn its original determination" and its refusal to grant plaintiff a hearing in connection with her efforts to obtain reversal of the Commission's original determination, are arbitrary and erroneous.

Defendant urges that there is no basis for setting aside the Commission's determination that plaintiff was totally disabled for useful and efficient service in her position, and that, its defense of this action having been prejudiced by plaintiff's delay in commencing suit in this court, her claim is in any event barred by the doctrine of laches.

For reasons hereinafter set forth, and without reaching the question of laches, it is concluded that defendant's position on the merits is valid. Accordingly, plaintiff is not entitled to recover.

Plaintiff's employment at Patrick Air Force Base ("AFB") began in 1951. In 1958 she was separated by adverse action from her position as an accounting technician, GS–6, for inefficiency. On appeal, the separation was cancelled as procedurally defective, and she was restored to duty retroactively. Shortly thereafter, however, she was downgraded from GS–6 to GS–5 pursuant to a reduction-in-force.

Insofar as the present record shows, plaintiff's employment at Patrick AFB from 1958 to mid-1966 was not only satisfactory but seemingly not particularly eventful. The sole recorded incident concerning her during this period occurred in November 1964, when plaintiff's request for authorization to work overtime was denied by her then supervisor, Mr. Clark. She became upset and began to cry, and, according to the supervisor, created a scene.[1] It is clear from the record, however, that throughout her employment at Patrick AFB plaintiff felt she was being intimidated, persecuted, and subjected to "harassing pressures" by her superiors at Patrick AFB.

Early in 1966, responsibility for aviation fuels accounting, for some 4 years prior thereto a substantial part of plaintiff's duties as an accounting technician, GS–6, was transferred to another office. Plaintiff was not assigned any duties to replace those transferred, and her complaints about the loss of duties met with no success.

In June 1966, plaintiff's office (and plaintiff) came under the supervision of Mr. Lopez-Vega, theretofore a GS–9 at the Air Force Accounting and Finance Center. Plaintiff felt that she was qualified for, and should have been promoted to, the GS–7 supervisory position given to the new supervisor, and it is fair to conclude that she was resentful of both the appointment and the appointee.

Prior to his arrival at Patrick AFB, Mr. Lopez-Vega had been told by the Chief, Accounting and Finance Branch, Patrick AFB, that if he accepted the GS–7 position there he would be working with plaintiff, and that she would be very difficult to deal with. At Mr. Lopez-Vega's initial introduction to plaintiff, she made no response whatever to his greeting to her, and in his opinion the initial meeting was very unpleasant. Thereafter, whenever he had a problem or a conflict with her, he made a memorandum for the record describing the incident.

Between June 12, 1966 and September 12, 1966, Mr. Lopez-Vega recorded five incidents concerning plaintiff: in general terms, her failure or refusal to carry out his instructions on June 17, August 1, and August 12, 1966; her use of hostile and insulting language to a fellow worker on June 29, 1966; and, on September 8, 1966, her refusal to comply with his written instructions, coupled with her subsequent use of a vulgar word which created a very unpleasant

[1] Mr. Clark noted the incident on a Patrick AFB form used by supervisors for annotating some discussions with employees. Plaintiff went to higher authority with her request, and ultimately received the authorization she sought.

situation in the office. There is no doubt that the several incidents just mentioned in fact occurred substantially as described.

In October 1966, plaintiff was reprimanded for failure to carry out her assigned duties in a reasonable period of time on August 12, 1966, and for disorderly conduct on September 8, 1966. In the meantime, effective September 12, 1966 (after a downgrading as a result of a position survey to accounting technician, GS–5, with saved pay for 2 years), she had been transferred to another section, where she again came under the administrative supervision of Mr. Clark. From September 12, 1966 to February 2, 1967, there was no recorded incident of plaintiff's attitude or conduct in her new position.

On the morning of February 2, 1967, plaintiff and her technical supervisor, a Miss Grice, engaged in a rather emotional exchange over plaintiff's mailing, contrary to Miss Grice's instructions, of an original, rather than a duplicate, of a report. During the course of the exchange, Miss Grice slammed a posting ledger on the desk in front of plaintiff. Plaintiff went to Mr. Clark about the incident, stating that she was being blamed for everything and asking when she was going to get out of the section. During the discussion with Mr. Clark, plaintiff began to cry and became very upset. Mr. Clark made a record of the incident, and reported it to the Chief, Accounting and Finance Branch.

Shortly thereafter, "by reason of your disruptive job behavior which has continued over the past 3 years", the Chief, Accounting and Finance Branch, directed plaintiff to report to Patrick AFB Hospital for a medical examination to determine whether she was physically able to continue in her assigned tasks. The report of that examination, conducted February 20, 1967, by an Air Force medical officer, reflected that plaintiff's emotional and mental stability were poor, and contained a recommendation for "psychiatric workup for existing personality disorder."

By letter dated March 16, 1967, plaintiff was informed by the Chief, Accounting and Finance Branch, of an appointment March 23, 1967, with Dr. Edward J. Adickes, of Indialantic, Florida, near Patrick AFB. Plaintiff was advised that government transportation to Dr. Adickes' office had been

arranged for her, and that if she refused to be examined or to have the results reported, she might be separated for that reason.

Dr. Adickes' March 24, 1967 report to the Civilian Personnel Office, Patrick AFB, of his psychiatric evaluation of plaintiff reflected the opinion that she evidenced marked difficulties in judgment when dealing with highly charged emotional material, and inappropriate and hostile attitudes. He concluded that plaintiff "has a persecution complex with paranoid delusions prominent enough to create difficulty in maintaining reasonable behavior." [2]

On April 6, 1967, Mr. Clark signed a Standard Form 2801–A, "Superior Officer's Statement In Connection With Application For Total Disability Retirement." Among other things, the said statement reflected that periodically plaintiff's "tantrums and emotional upsets disrupted the office." Under the heading of "instances of emotional instability or abnormal behavior", Mr. Clark listed the November 1964 incident involving plaintiff and Mr. Clark, each of the five June-September 1966 incidents described above, and the February 1967 incident involving plaintiff and Mr. Clark.

On April 19, 1967, plaintiff was afforded an opportunity to apply for disability retirement, but emphatically declined to do so. On April 20, 1967, an agency application for her disability retirement, accompanied by Standard Form 2801–A, the report of plaintiff's February 20, 1967, examination at Patrick AFB Hospital, Dr. Adickes' March 24, 1967, report, and a statement that plaintiff refused to execute an application for disability retirement were transmitted to the Atlanta Region, Civil Service Commission ("CSC").

At the request of the Regional Medical Officer, Atlanta Region, CSC, plaintiff was seen by Dr. James R. Parsons, of Melbourne, Florida, also near Patrick AFB, on May 25, 1967. Dr. Parsons had never seen plaintiff prior to that date, but he had received from Patrick AFB, and had read, a copy of Dr. Adickes' March 24, 1967, report concerning her. Dr. Parsons' understanding in 1967 was that only one appointment for plaintiff with him in connection with his evaluation of her was possible.

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[2] Dr. Adickes died well prior to trial of this cause.

By letter dated June 15, 1967, to the Regional Medical Officer, Atlanta Region, CSC, Dr. Parsons reported plaintiff's sudden loss of courtesy and composure within less than 5 minutes, and her demonstration of "a very marked 'push of speech' * * * interrupted by flashes of intense hostility in her eyes, followed by inappropriate smiling, when tears would well up and almost overflow." He felt that on some level of consciousness plaintiff knew she was very ill, stated that he hoped she would be able to receive treatment, and made a diagnosis of "Schizophrenic Reaction, Paranoid Type, With Depressive Trend."

In due course the agency application and supporting documentation reached the Bureau of Retirement and Insurance, CSC, Washington, D.C., and on July 20, 1967, plaintiff was notified that it had been determined that she should be retired for disability, and was advised of her right of appeal.

In August 1967, plaintiff transmitted to the Bureau of Retirement and Insurance the opinion of Dr. William H. Geiger, a private psychiatrist who had examined her August 10, 1967. Dr. Geiger's impression was, in substance, that plaintiff was intelligent, with no evidence of organic brain damage or major mental illness. Treating plaintiff's correspondence as an appeal, the Medical Division, CSC, forwarded the matter to the Board of Appeals and Review ("BAR"). By decision dated October 31, 1967, the BAR, after referring to the medical evidence in the record, including Dr. Geiger's opinion, upheld the determination of the Bureau of Retirement and Insurance. In consequence, plaintiff's disability retirement became effective June 11, 1968.

Thereafter, plaintiff (and others on her behalf) began an extensive series of correspondence with the Commission, as detailed in the accompanying findings. Among other things, plaintiff sought, obtained, and submitted to the Commission from time to time, reports from psychiatrists and psychologists who had examined her, and in January 1969, she requested, as she had prior thereto, that she be afforded a hearing.

The 1969 request for hearing followed a second visit, on September 23, 1968, to Dr. Parsons. During this visit, lasting approximately 45 minutes, plaintiff presented to Dr. Parsons letters she had obtained from Dr. Geiger and other doctors following May 1967.

By letter dated September 24, 1968, to the Commission, Dr. Parsons stated that he felt that his earlier impression of plaintiff was "not consistent with her present appearance, as well as the fact that she has been able to impress other psychiatrists favorably", and that following plaintiff's 1967 appointment with him he had instructed his secretary to refuse further "single-visit-evaluations" since such evaluations were "not fair to either patient or pschiatrist." Dr. Parsons concluded that:

> In retrospect, I feel that [plaintiff] was under a strain of presenting a tremendous amount of information to me in a very limited time, so that she appeared much more disorganized than she actually is. Again, that single interview was not entirely equitable; I see no reason why [plaintiff's] appeal should not be considered favorably.

Then and on several occasions thereafter, however, the Commission has consistently adhered to its determination that allowance of the agency's application for plaintiff's disability retirement was warranted. Nor was plaintiff ever afforded a hearing by the Commission.

In the 1966 codification of Title 5, United States Code, Congress provided that any federal employee "who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency", that the Commission should "determine questions of disability and dependency arising under this subchapter", and that "The decisions of the Commission concerning these matters are final and conclusive and not subject to review." 5 U.S.C. §§ 8337, 8347(c) (1970).

In *Scroggins* v. *United States*, 184 Ct. Cl. 530, 533–34, 397 F. 2d 295, 297, *cert. denied*, 393 U.S. 952 (1968), this court held that the latter provision

> * * * is a special and unusual restriction on judicial examination, and under it courts are not as free to review Commission retirement decisions as they would be if the "finality" clause were not there. * * * at best, a court can set aside the Commission's determina-

> tion "only where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962). * * *

See also *Lech* v. *United States*, 187 Ct. Cl. 471, 409 F. 2d 252 (1969); *McGlasson* v. *United States*, 184 Ct. Cl. 542, 397 F. 2d 303 (1968); *Kleinfelter* v. *United States*, 162 Ct. Cl. 88, 318 F. 2d 929 (1963).

One of plaintiff's arguments is that the actions of officials at Patrick AFB in preparing an application for disability retirement constituted vitiating error. Focusing upon the Standard Form 2801–A prepared concerning plaintiff, she vigorously urges that Patrick AFB officials overzealously magnified "isolated confrontations between plaintiff and her supervisors * * * out of all proportion * * *", that she was neither emotionally unstable nor a disruptive influence in her office, and that "The events do not support the conclusion which the Agency drew."

The presumption that government officials have acted in good faith in making a decision can be overcome only by a strong showing to the contrary. *Roski* v. *United States*, 204 Ct. Cl. 40 (1974); *Grover* v. *United States*, 200 Ct. Cl. 337, 343–44 (1973). There is no room for doubt that the incidents listed by Mr. Clark in the Standard Form 2801–A occurred, nor is there any persuasive proof in this record of distortion, magnification, or improper motivation by any agency official in connection with Standard Form 2801–A. While there is room for doubt that agency action in preparing the application is of any relevance here, it is in any event clear that the presumption of good faith has not been overcome. *Lech* v. *United States*, *supra*; *McGlasson* v. *United States*, *supra*.

Moreover, the incidents listed in the Standard Form 2801–A were not the sole basis for the agency's April 20, 1967, decision to apply for plaintiff's involuntary retirement for physical disability, as plaintiff seems to suggest. That decision followed, and rested in large part upon, a February 20, 1967, report of medical examination at Patrick AFB Hospital, stating that plaintiff needed a psychiatric

workup for an existing mental disorder, and Dr. Adickes' March 24, 1967, psychiatric report, stating that plaintiff had a persecution complex with prominent paranoid delusions.

If, as plaintiff asserts, she might properly have been subjected to disciplinary action in consequence of the incidents listed in Standard Form 2801–A, the actual agency decision in April 1967 to apply for plaintiff's involuntary retirement plainly affords no basis for granting any relief here. *Scroggins* v. *United States*, *supra*; *McGlasson* v. *United States*, *supra*; *Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962).

Plaintiff also contends that Dr. Parsons' original evaluation of plaintiff, in May 1967, was unfair, improper, and inaccurate, that "once Dr. Parsons determined that his evaluation of plaintiff was inaccurate and improper, then there was an error which went to the very heart of the administrative determination", and that when Dr. Parsons "repudiated his position and announced that he was wrong, the refusal [of the Commission] to overturn its original determination was arbitrary."

Dr. Parsons' September 1968 report to the Commission concerning plaintiff was made, as was his June 1967 report, after seeing her for about 45 minutes. His only other contact with plaintiff between the two reports was very brief. On careful reading, Dr. Parsons' September 1968 report reflected clearly his opinion that a "single-visit-evaluation" was inherently unfair, and that plaintiff's "present appearance" was not consistent with his earlier impression of her, but the argument that he "repudiated his position and announced that he was wrong", then or in later presentations to the Commission, is not entirely accurate. That aside, however, plaintiff's position is not a tenable one.

The duty of determining questions of disability is imposed by statute on the Commission, and only some error "going to the heart of the administrative determination", as defined in *Scroggins* v. *United States*, *supra*, permits the setting aside by a court of the administrative discharge of that duty. Even repudiation of a medical evaluation adverse to an employee would not inexorably lead to such action. *Cf. Roski* v. *United States*, *supra*.

Dr. Adickes' psychiatric evaluation of plaintiff, which he refused to reconsider, was adverse to her. Dr. Parsons did reconsider, and at least at trial, he did testify that his first opinion was definitely inaccurate. In any event, the Commission had before it a mass of medical evidence, as detailed in the findings, concerning plaintiff. In March 1971, and again on April 1, 1971, the Commission reviewed all of the medical evidence before it. On both occasions it concluded that reopening its previous decision was unwarranted. "There is plainly no error going to the 'heart of the administrative determination' when the Commission accepts one medical view rather than another." *Scroggins* v. *United States*, *supra*, 184 Ct. Cl. at 537, 397 F. 2d at 300; see also *McGlasson* v. *United States*, *supra; Gaines* v. *United States*, *supra; cf. Roski* v. *United States*, *supra.*

In her main brief, filed herein April 9, 1973, plaintiff conceded that she was not entitled, under Commission regulations, to a hearing "in the first instance", but asserted that the Commission's failure to grant her request for a hearing after Dr. Parsons' 1968 letter to the Commission was arbitrary.

Putting considerations of due process aside for the moment, the Commission was under no legal obligation to grant plaintiff a hearing in connection with the application for her retirement, nor, "even though that course might have been wiser or more advisable", was it under any legal obligation to do so in connection with her repeated requests for reconsideration. *Scroggins* v. *United States*, *supra*, 184 Ct. Cl. at 535, 397 F. 2d at 298. Indeed, plaintiff's argument in this connection is, on analysis, really no more than that the circumstances warranted a hearing, and that the Commission had authority to hold one.

In plaintiff's reply brief, however, a right to a "due process hearing *before* the termination of her rights as a Civil Service employee and her discharge from public employment" is asserted. For this proposition, plaintiff cites *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); and *Kennedy* v. *Sanchez*, 349 F. Supp. 863 (N.D. Ill. 1972), *prob. juris. noted sub nom.*, *Phillips* v. *Kennedy*, 411 U.S. 915

(1973) (*rev'd sub nom.*, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).[3] While this claim of constitutional right is plainly inconsistent with plaintiff's earlier concession, it is nonetheless now to be considered. See *Scroggins* v. *United States*, *supra*, 184 Ct. Cl. at 534, n. 4, 397 F. 2d at 298, n. 4; *cf. Roski* v. *United States*, *supra; Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969).

It is clear that the range of interests protected by procedural due process is not infinite. *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 570; *cf. Sampson* v. *Murray*, 415 U.S. 61 (1974). And, in light of *Arnett* v. *Kennedy*, *supra*, it is equally clear that plaintiff's claim of constitutional right to a hearing prior to her disability retirement is invalid.

While plaintiff has not urged a constitutional right to a due process hearing following her disability retirement, the several opinions in *Arnett* v. *Kennedy*, *supra*, strongly suggest that this aspect of the matter too should be considered and decided.

In *Scroggins* v. *United States*, *supra*, plaintiff asserted both a statutory and a constitutional right to a "trial-type hearing (or the prime elements of one) * * *" in connection with her involuntary retirement for disability. The court, observing that it and other courts had "already declared otherwise", saw "no adequate reason to depart at this time from that unanimous position."

Neither *Arnett* v. *Kennedy*, *supra*, nor any of the cases cited in plaintiff's reply brief, involved the disability retirement of a federal employee.[4] As late as December 1973, the court held that the involuntary retirement for physical disability, without prior hearing, of a hearing examiner was invalid on statutory, not constitutional, grounds. *Benton* v. *United States*, 203 Ct. Cl. 263, 488 F. 2d 1017 (1973). In light of the nature of this case, the decisions of this court

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[3] Plaintiff's Reply Brief was filed herein November 15, 1973, some months prior to the decision in *Arnett* v. *Kennedy*, *supra*.

[4] Justice White in *Arnett* v. *Kennedy*, *supra*, states at page 186:

"A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials. This is not such a case, however, since Kennedy was terminated on specific charges of misconduct."

in *Scroggins* and *Benton*, and the absence of any authority contradicting the "unanimous position" taken by this and other courts on this issue, no denial of plaintiff's constitutional rights can be perceived.

Furthermore, in *Arnett* v. *Kennedy*, *supra*, at 178–179, with relation to the requirement of a hearing at "some time," Justice White stated as follows:

> * * * Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of food unfit for consumption); *Central Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (seizure of property under Trading with the Enemy Act); *Corn Exchange Bank* v. *Coler*, 280 U.S. 218 (1930) (seizure of assets of an absconding husband); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931) (collection of a tax); *Bowles* v. *Willingham*, 321 U.S. 503 (1944) (setting of price regulations); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (appointment of conservator of assets of savings and loan association); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

In *Phillips* v. *Commissioner*, *supra*, a tax case, the hearings mentioned in the case include hearings in courts; in *Central Trust Co.* v. *Garvan*, *supra*, a trading with the enemy case, the hearing referred to is also that in the courts after the taking. An examination of the other cases cited indicates that they contemplate a later court review. In other words, the due process requirement is met where a later court proceeding is allowed. In the present case, plaintiff was afforded a full hearing before the trial judge of this court. The hearing lasted two days. The transcript of testimony covers 436 pages, and 13 witnesses were heard with full right of cross examination given plaintiff. Plaintiff herself testified. Plaintiff's complaint that there was no hearing is certainly satisfied by the hearing afforded before the trial judge. The requirement in *Arnett* v. *Kennedy* of a hearing at "some time" is clearly met.

See, also, *Regional Rail Reorganization Act Cases*, 43 U.S.L.W. 4031, 4045 (U.S. Dec. 16, 1974), where the Court stated:

> * * * Further, with the Tucker Act remedy, the payment of "fair and equitable consideration" in compliance with the reorganization statutes is assured, and procedural due process is satisfied.

Accordingly, and without reaching the possible impact of the doctrine of laches on plaintiff's claim, it is concluded that she is not entitled to recover, and that the petition should be dismissed.

SKELTON, *Judge*, concurring:

I concur in the decision of the court for the sole reason that under our rules our panel cannot overrule the *en banc* decision of the court in *Scroggins* v. *United States*, 184 Ct. Cl. 530, 397 F. 2d 295, *cert. denied*, 393 U.S. 952 (1968) in which the court held that in an involuntary retirement case where physical disability is the basis for the retirement, the retired employee is not entitled to a hearing at any stage of the proceedings.

Were it not for our rule aforesaid, I would dissent on the ground that the plaintiff was entitled to a hearing before her involuntary retirement became final because of the later decision of the Supreme Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and other similar cases. In that case the Supreme Court held that a government job was property that could not be taken away from an employee without a hearing at some stage of the proceedings because of the due process clause of the Constitution. While it is true that case involved the discharge of an employee for cause and not retirement for disability, I think the same basic rules should apply and that a hearing is required by the due process clause in both instances. See also the following decisions of the Supreme Court in which the Court held that where property is taken from a citizen the due process clause requires a hearing: *Connell* v. *Higginbotham*, 403 U.S. 207 (1971) (loss of a state job); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (loss of welfare payments); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (revocation of a parole); *Wolff* v. *McDonald*, 418 U.S. 539 (1974) (cancellation of a prisoner's good-time

credits); *Bell* v. *Burson*, 402 U.S. 535 (1971) (cancellation of a driver's license); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) (damaged reputation and standing); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment of wages); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (seizure of mortgaged property); and *Goss* v. *Lopez*, 43 U.S.L.W. 4181 (U.S. Jan. 22, 1975) (suspension of school children).

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1978

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

GRACE K. McFARLAND, *Petitioner,*	:	
v.	:	**No. 746-71**
THE UNITED STATES, *Respondent.*	:	

Before SKELTON, *Judge,* Presiding, KASHIWA and KUNZIG, *Judges.*

ORDER

This case comes before the court on plaintiff's motion, filed May 22, 1975, for rehearing *en banc* pursuant to Rules 7(d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court (Judge Davis not participating) as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

[June 27, 1975]

/s/ SHIRO KASHIWA
Shiro Kashiwa
Judge, acting for the Presiding Judge

SKELTON, *Judge,* would grant an *en banc* rehearing under Rule 7(d).

No. 75-473

Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

GRACE K. MCFARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-479

GRACE K. MCFARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims she was entitled to an administrative hearing on her involuntary retirement from the federal civil service by reason of physical disability.

Petitioner, an accounting technician, began working as an Air Force employee at Patrick Air Force Base in 1951. Between June 12, 1966, and September 12, 1966, petitioner's supervisor recorded five separate incidents of office disturbances occasioned by

petitioner; an earlier disturbance was recorded in November 1964. After another disturbance on February 2, 1967, the Chief, Accounting and Finance Branch, Patrick AFB, directed that petitioner report to the Base Hospital for a medical examination to determine whether she was physically able to continue in her assigned tasks. The report of that examination, conducted by an Air Force Medical Examiner, recommended that petitioner be given a "psychiatric workup for existing personality disorder" (Pet. App. 2a-4a). A psychiatric examination was then conducted on March 23, 1967, by Dr. Adickes, a private physician. Dr. Adickes reported his findings that petitioner evidenced inappropriate and hostile attitudes and concluded that she "has a persecution complex with paranoid delusions prominent enough to create difficulty in maintaining reasonable behavior" (Pet. App. 5a).

Petitioner's supervisor then filed an application under 5 U.S.C. 8337(a) seeking petitioner's retirement for disability.[1] He cited various "instances of emotional instability or abnormal behavior" which had "disrupted the office" (Pet. App. 5a). After petitioner herself refused to apply for disability retirement, the Civil Service Commission's regional medi-

[1] The Civil Service Retirement Act, 5 U.S.C. 8337, in pertinent part provides:

> (a) An employee who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency.

cal officer requested that petitioner be examined by another physician. The second physician, Dr. Parsons, made a diagnosis of "Schizophrenic Reaction, Paranoid Type, With Depressive Trend" (Pet. App. 6a).

After considering the agency's application and supporting documents, the Civil Service Commission's Bureau of Retirement and Insurance determined that petitioner should be retired for physical disability, and on July 20, 1967, advised petitioner of her right to appeal (Pet. App. 6a). In support of her appeal, petitioner adduced the opinion of a third physician, Dr. Geiger, who examined petitioner in August 1967. On October 13, 1967, after reviewing all the evidence, the Civil Service Commission's Board of Appeals and Review upheld the disability determination, and petitioner's disability retirement became effective June 11, 1968 (Pet. App. 6a).

Thereafter, petitioner began an extensive correspondence with the Commission, submitting from time to time reports from psychiatrists and psychologists who had examined her, including a September 24, 1968 letter from Dr. Parsons, stating that his prior single visit with petitioner "was not entirely equitable" and that he saw no reason why petitioner's appeal "should not be considered favorably" (Pet. App. 6a-7a). Petitioner also renewed her request for a hearing. However, after reviewing all of the evidence adduced by petitioner, the Board of Appeals and Review concluded that the new medical evidence

submitted did not warrant an oral evidentiary hearing or the reopening of the case (Pet. App. 7a).

On September 30, 1971, petitioner brought this action against the United States in the Court of Claims, seeking to recover back salary, less appropriate offsets, from and after June 12, 1968, on the ground that her involuntary retirement for physical disability was unlawful. After conducting an evidentiary hearing, the trial judge issued a recommended decision in which he found that the Commission's evaluation of the "mass of medical evidence" before it did not constitute "error going to the 'heart of the administrative determination' " and that petitioner's due process rights were not violated (Pet. App. 10a-13a). The Court of Claims, in a *per curiam* decision, adopted the recommended decision, and dismissed the petition (Pet. App. 1a, 13a).

1. The Court of Claims' decision that due process does not require a full oral evidentiary hearing in cases of involuntary disability retirement has no prospective significance. On June 11, 1968, when petitioner's retirement took effect, neither the Civil Service Retirement Act nor the applicable regulations provided for such a hearing in instances of involuntary disability retirement. However, in 1974 the Civil Service Commission adopted regulations that now provide federal employees with the right to a full evidentiary hearing prior to the Commission's final determination to grant an agency's application for disability retirement. 5 C.F.R. 831.1205; 5 C.F.R. 772.307(b).

2. The Court of Claims correctly determined that the Commission's former procedures satisfied due process. Petitioner was accorded notice and opportunity to furnish the Commission with documentary medical evidence in support of her position (Pet. App. 6a), and the Commission's determination was based upon its evaluation of the "mass of medical evidence" before it. Those procedures were all that was constitutionally required to vindicate petitioner's limited interest in continued federal employment.

The Civil Service Retirement Act, which defines a federal employee's interest in continued employment, provides that an "employee who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency" (5 U.S.C. 8337(a)), that "[t]he Commission shall determine questions of disability and dependency" (5 U.S.C. 8347(c)), and that "[t]he decisions of the Commission concerning these matters are final and conclusive and are not subject to review" (*ibid.*). The Act makes no provision for an administrative hearing, and the lower federal courts have consistently held that implementation of the involuntary retirement provisions of the Act does not require a full oral evidentiary hearing. *Scroggins* v. *United States*, 397 F. 2d 295, 298 (Ct. Cl.), certiorari denied, 393 U.S. 952; *Chafin* v. *Pratt*, 358 F.2d 349, 355-358 (C.A. 5), certiorari denied, 385 U.S.

878; *Rosenblum* v. *United States Civil Service Commission*, 224 F. Supp. 281, 282 (W.D. Pa.).

In any event, petitioner was accorded a full oral evidentiary hearing in the Court of Claims on the merits of her claim to have been improperly retired, and as that court correctly concluded (Pet. App. 12a):

> The hearing lasted two days. The transcript of testimony covers 436 pages, and 13 witnesses were heard with full right of cross examination given [petitioner]. [Petitioner] herself testified. [Petitioner's] complaint that there was no hearing is certainly satisfied by the hearing afforded before the trial judge.

Thus if, as petitioner believes, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134, requires a hearing at some time in connection with the termination of non-probationary federal employment, that requirement was nevertheless met here.[2]

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[2] The question in *Arnett* v. *Kennedy, supra*, concerned the removal of a non-probationary employee for cause under the Lloyd-La Follette Act, 5 U.S.C. 7501. Such a removal is of course very different from an involuntary retirement (*Ellmore* v. *Brucker*, 236 F. 2d 734, 735 (C.A.D.C.), certiorari denied, 352 U.S. 955):

> The [Lloyd-La Follette Act] deals in terms with removal or suspension "for such cause as will promote the efficiency" of the service. An employee who has been placed on an annuity because of medical disability has not been "removed or suspended without pay" and for "cause" within the meaning of the disciplinary provisions of the Lloyd-La Follette Act. The two statutes clearly serve different purposes, and are independently operative in their respective fields.

3. Furthermore, petitioner's claim is barred by laches, in view of her unjustified delay of almost four years in bringing this suit.[3] See *Alpert* v. *United States*, 161 Ct. Cl. 810, 820-821. Petitioner's delay[4] in commencing this action prejudiced the United States in two respects. First, if petitioner were to prevail, the government would have to pay two salaries for a single position, for after her retirement on June 11, 1968, petitioner's position at Patrick AFB was continuously occupied by another employee. See *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372; *Grisham* v. *United States*, 392 F. 2d 980, 983 (Ct. Cl.), certiorari denied, 393 U.S. 843. Second, the delay prejudiced the government's ability to defend on the merits.[5]

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[3] In view of its ruling on the merits, the Court of Claims did not find it necessary to reach the question of laches (Pet. App. 1a, 13a).

[4] Petitioner's claim accrued on October 31, 1967, the date on which the Commission's Board of Appeals and Review upheld the disability determination of the Bureau of Retirement and Insurance (Pet. App 6a). Petitioner's subsequent initiation of a series of correspondence with the Commission does not excuse a four-day delay in commencing suit (until September 30, 1971). See *Jones* v. *Summerfield*, 265 F.2d 124, 125 (C.A.D.C.), certiorari denied, 361 U.S. 841.

[5] Dr. Adickes, the psychiatrist who could have been expected to be the government's main witness, died on September 7, 1971, shortly before petitioner's commencement of this suit on September 30, 1971 (Trial Judge's Finding of Fact No. 16(c)). Petitioner's long delay in commencing suit also resulted in the weakening of the government's case at trial due to the dimming of memories (*e.g.*, Transcript of Trial Proceedings, October 10-11, 1972, pp. 98, 403, 406, 415).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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